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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAUL VARGAS, Defendant and Appellant.	B291761 (Los Angeles County Super. Ct. No. VA141400)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Remanded with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Raul Vargas was convicted after a jury trial of multiple counts charging sexual molestation of a child. Defendant does not appeal his conviction, but does raise three claims of error regarding the 80 years to life sentence the trial court imposed. The Attorney General concedes error on two of those claims. As for the third, we agree with defendant that his sentence on two of the counts of conviction should have been stayed pursuant to Penal Code section 654 because, as the prosecutor argued at trial, the acts at issue in those two counts were identical to acts punished by other counts.[1] We remand with directions to correct these sentencing errors.

FACTUAL AND PROCEDURAL BACKGROUND

Y. is the eldest daughter of defendant.[2] Beginning around the age of five or six, defendant started touching Y.'s private areas.

In 2016, Y. was 11 years old. In January or early February of that year, while Y. was sleeping, defendant pulled down her pants and inserted his penis into her anus. Y. woke up and squirmed because this hurt. Defendant then rolled Y. over and put his penis in her vagina. This also caused Y. pain. When Y. showered the next day, her anus and vagina burned.

Approximately two weeks after this assault, while Y. was sleeping, defendant laid down next to her. Defendant grabbed Y.'s hand and made her touch his erect penis. While Y. pretended to still be asleep, defendant moved Y.'s hand up and

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[1] All statutory references are to the Penal Code.

[2] We refer to the victim by an initial to protect her personal privacy. (Cal. Rules of Court, rule 8.90(b)(4).)

down until he ejaculated onto her hand. During this incident, defendant also touched Y.'s breasts, and penetrated her vagina with his finger as well as his penis. After he was done, defendant got up and went into the bathroom.

On March 4, 2016, Y. was sleeping. Around 11 p.m., Y. was awoken by defendant pulling down her pants and underwear. While Y. pretended to be asleep, defendant touched her front pelvic area, then inserted his fingers in her vagina for several minutes. He grabbed her left breast. Defendant then repositioned himself as well as Y., and put his tongue into her vagina twice. The molestation ended when he pulled her pants back up and left to go to into the bathroom.

There was also testimony, unspecific as to a particular date other than it being prior to the last incident on March 4, 2016, that defendant inserted a finger into Y.'s anus.

On March 7, 2016, Y. told her mother defendant had been sexually assaulting her. The mother called the police, and defendant was arrested. Analysis of Y.'s underwear confirmed stains on it were semen, and DNA analysis of the semen matched defendant's genetic profile at a rate of one in 3.7 quadrillion—meaning at most one person in 3.7 quadrillion, if chosen at random, would have that same profile. While in custody, defendant wrote a letter to Y. saying he "admitted my entire fault" and asking for forgiveness. He also admitted some of his actions to Y.'s mother during a recorded phone call defendant made from jail.

Defendant was charged with 12 felony counts, and following trial by jury was found guilty on all counts. Seven of those twelve counts are pertinent to this sentencing appeal—

counts one, three, six, and seven alleging sexual penetration, and counts two, five, and nine alleging oral copulation. Counts one and three charged sexual penetration on or about March 4, 2016 as follows: aggravated sexual assault of a child by sexual penetration in violation of § 269, subd. (a)(5) (count one), and sexual penetration of a child in violation of § 289, subd. (j) (count three). Counts six and seven charged sexual penetration on or between January 2—February 14, 2016 as follows: aggravated sexual assault of a child by sexual penetration in violation of § 269, subd. (a)(5) (count six), and sexual penetration of a child in violation of § 289, subd. (j) (count seven). Counts two, five and nine charged oral copulation as follows: aggravated sexual assault of a child by oral copulation in violation of § 269, subd. (a)(4) (count two), aggravated sexual assault of a child by oral copulation, in violation of § 269, subd. (a)(4) (count five), and oral copulation of a child in violation of § 288a [renumbered to 287, eff. Jan. 1, 2019], subd. (c)(1) (count nine).

On August 1, 2018, defendant was sentenced to a term of 80 years to life consisting of (1) four consecutive sentences of 15 years to life on counts 1, 2, 5 and 6, (2) six years on count 3, and (3) consecutive terms of two years each on the remaining seven counts (4 and 7-12).

Defendant timely appealed the sentence imposed.

DISCUSSION

Defendant contends the sentences on counts three and seven should have been stayed pursuant to section 654 because—as argued by the prosecutor at trial—those counts were based on the same acts of sexual penetration for which he was charged in counts one and six, respectively. The Attorney General argues

the sentences on counts three and seven were correctly imposed and should not be stayed, because regardless of the prosecutor's closing argument, the jury could reasonably have found at least four separate acts of sexual penetration justifying four separate punishments on counts one, three, six, and seven.

Defendant further contends the mandatory consecutive sentence imposed on count five was error because the two acts of oral copulation were not separated by the required reasonable opportunity for reflection after completing the first act and before resuming the assaultive behavior. Defendant finally argues the sentence on count nine should have been stayed because count nine was based on the same conduct as counts two and five. The Attorney General concedes the sentences on courts five and nine were erroneously imposed.

A. The Sentences on Counts Three and Seven Should Have Been Stayed

1. Section 654 and the Standard of Review

"Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." Section 654 does not bar multiple punishment, however, simply because distinct sex offenses are rapidly committed against a victim with a common purpose of sexual gratification. (*People v. Harrison*

(1989) 48 Cal.3d 321, 325; *People v. Castro* (1994) 27 Cal.App.4th 578, 584—585.)

At sentencing, defendant did not request the trial court stay the sentence on any counts, nor did either party discuss section 654's applicability to defendant's sentence. However, errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) We look to the case presented to jurors and their verdict to determine whether multiple counts of conviction involve a single act or multiple acts. (*People v. Jones*, *supra*, 54 Cal.4th at p. 359; see also *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339 ["where there *is* a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654" (italics added)].)

Only if a case involves more than one act does a court go on to consider whether that course of conduct reflects a single intent and objective, or multiple intents and objections, for the purposes of applying section 654. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) Whether there is a single intent and objective or multiple intents and objectives is a factual question for the sentencing court. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.)

"We review the trial court's implied determination that section 654 does not apply for substantial evidence." (*People v. Leonard* (2014) 228 Cal.App.4th 465, 499.) That means we "review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the

trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

2. Section 654 Applies to Counts Three and Seven

Defendant's argument for the application of section 654 to counts three and seven is straightforward. In closing, the prosecutor argued counts 1 and 3 both addressed the same act of digital vaginal penetration on March 4, 2016 and counts 6 and 7 both addressed the same act of digital anal penetration occurring sometime between January 2—February 14, 2016. Therefore, defendant reasons, the sentences on counts three and seven should be stayed because they punished the same physical act at issue in counts one and six, respectively. (*People v. Jones*, *supra*, 54 Cal.4th at p. 358.)

Acknowledging defendant accurately describes the prosecutor's argument below, the Attorney General argues the jurors were not bound by that argument, and there is substantial evidence from which the jury could have found four distinct acts of sexual penetration supporting four distinct punishments. In particular, the Attorney General argues there was substantial evidence to support a jury finding the following four separate acts: digital vaginal penetration on March 4, 2016 under count one, digital anal penetration on March 4, 2016 under count three, digital vaginal penetration approximately two weeks before March 4, 2016 under count six, and penile penetration two weeks, or one month, before March 4, 2016 under count seven.

(a) Count Three

We disagree substantial evidence exists to support the Attorney General's suggested deviation from the People's case at

trial. While we are not bound by the prosecutor's argument, it is a factor to consider when analyzing the application of section 654. (See *People v. Jones*, *supra*, 54 Cal.4th at p. 359.) With regard to count three, the testimony regarding digital anal penetration indicated it occurred sometime prior to the last time defendant touched Y. Unsurprisingly, that is what the prosecutor argued at trial in suggesting such penetration supported conviction on counts six and seven (which addressed the period January 2—February 14, 2016)—not count three (which addressed March 4, 2016).

The Attorney General's argument that count three could have involved separate conduct from count one suffers from an additional defect, as it depends on construing count six as involving digital vaginal penetration between January 2—February 14, 2016, rather than digital anal penetration as argued at trial. When " 'one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." ' " (*People v. Brown* (2017) 11 Cal.App.5th 332, 341.) Because the prosecution elected to proceed on the theory count six involved a specific act of digital anal penetration between January 2—February 14, 2016, the jury was not given a unanimity instruction on that count because it was clear what specific act the People were relying upon to prove that charge.[3] We cannot

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[3] The jury was instructed on the need for unanimity on certain other counts that alleged conduct within a date range and not on a specified date, but not as to count six.

undo that election by looking for evidence of another act during those six weeks, as to which the prosecutor did not argue for conviction in her closing and as to which the jury was not instructed on the need for unanimous agreement on the particular act committed in order to convict. "[W]hen the prosecution has made an election, under circumstances where a unanimity instruction would otherwise have been required, then we, too, are bound by that election." (*People v. Brown*, *supra*, 11 Cal.App.5th at p. 341.)

(b) Count Seven

With regard to count seven, while there was evidence to suggest penile penetration on more than one occasion, the jury instructions expressly stated that penetration for purposes of a conviction on count seven could not include penetration by a sexual organ. The Attorney General notes that section 289, subdivision (k)(3) provides that penetration with a foreign object can include a sexual organ "when it is not known whether the penetration was by a penis or by a foreign object." However, the jury was not instructed on this aspect of the law, nor did the prosecutor argue penetration was by an unknown object—she argued, "You know that the foreign object is the finger . . . ." "We presume jurors understand and follow instructions." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 969.) We decline to find jurors convicted on a theory as to which they were never instructed (indeed, where they were instructed to the contrary), and that was never argued at trial.

Because substantial evidence does not support the trial court's implied finding that the conduct punished by counts three and seven was distinct from the conduct already punished by

counts one and six, the sentences on counts three and seven should have been stayed.

B. The Sentence on Count Five Should Not Have Been Consecutive

Defendant argues, the Attorney General concedes, and we agree that the trial court erred in sentencing defendant on one of the two counts of aggravated sexual assault by oral copulation (counts two and five). A mandatory sentence under section 667.6, subdivision (d) is erroneous " 'if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior.' " (*People v. King* (2010) 183 Cal.App.4th 1281, 1325.) Here, as the Attorney General acknowledges, the record does not demonstrate the required moment or opportunity for reflection between the two tongue thrusts. Accordingly, we agree with the parties that it was error to impose a mandatory consecutive sentence under section 667.6, subdivision (d), on count five in addition the mandatory consecutive sentence imposed on count two.

C. The Sentence on Count Nine Should Have Been Stayed

Defendant contends, the Attorney General concedes, and we agree that the two-year sentence for oral copulation on count nine should have been stayed because it was based on the same criminal acts as counts two and five, and therefore subject to section 654. Because count nine carries a shorter term of imprisonment than counts two and five, the sentence on count nine must be stayed under section 654.

DISPOSITION

The conviction is affirmed. The matter is remanded with directions to stay the sentences on counts three, seven and nine pursuant to Penal Code section 654, and to correct the erroneous imposition of a mandatory consecutive sentence on count five. The court shall recalculate the sentence accordingly, amend the abstract of judgment and any related minute orders, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.